United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1064

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DONALD N. GERVASI,
Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

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TABLE OF CONTENTS.

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BRIEF OF APPELLEE

Preliminary Statement

The defendant-appellant was charged in a four-count indictment, filed with the Clerk of the United States District Court for the Western District of New York on June 30, 1972, with sale and possession of counterfeit obligations of the United States. The first two counts charged that on June 19, 1972, he possessed and sold $10,000 of counterfeit $20 Federal Reserve Notes. The last two counts charged that on June 28, 1972, he possessed and sold $50,000 of counterfeit $20 Federal Reserve Notes.

On March 19 and 20, 1973, a suppression hearing was held before the late Judge John O. Henderson, resulting in a ruling by that Court that the counterfeit money and a

telephone conversation had between the defendant-appellant and Secret Service Agent Samuel Zona on June 26, were admissible.

Trial commenced on September 25, 1973 and concluded on September 28, 1973 without the defendant putting in proof (278). Over the objection of the prosecutor, the Court gave the standard charge on entrapment. Subsequent thereto, the jury returned verdicts of not guilty on each of the first three counts and a verdict of guilty on the fourth count which charged the defendant-appellant with possession of approximately $50,000 in counterfeit obligations (T. 369).[1]

On December 17, 1973, the defendant was sentenced to the custody of the Attorney General for imprisonment for a period of seven years in an institution designated by the Attorney General. Defendant's Notice of Appeal was timely filed.

Statement of Facts

The facts of this case are simple. Without question, the United States Secret Service, Buffalo, New York office, developed one Donald Catalano, a convicted counterfeiter, as an informant, wherein Catalano agreed to introduce an agent of the Secret Service to the appellant (T. 76-77). That agent was Samuel J. Zona. Pursuant thereto and on June 16, 1972, at a gas station owned and operated by the appellant under the name and style of Don's Arco Service Station, Main and Transit Roads, Clarence, New York, Donald Catalano introduced Agent Zona, acting under cover as Sam Spitale from Rochester, New York (T. 14-18, 96). Other than an introduction of "Sam" to Donald Gervasi, all other conversations were between Catalano and the appellant (T. 16-17).

[1] Reference to Trial Transcript.

Then, on June 19, 1972, Zona returned to Gervasi's gas station. They walked to a back room where a conversation took place (T. 18-19). During the course of that conversation, Gervasi asked Zona if he really wanted to deal in counterfeit; Zona replied, "Yes, if the price is right." Gervasi then went on to tell Zona that to make counterfeit currency look aged and genuine it had to be cured by dipping it in coffee or tea (T. 19). Gervasi continued the conversation by stating that he had given $40,000 counterfeit to a friend who "dropped" the money in California. Gervasi concluded that conversation by saying that he would only deal if Catalano were present and the genuine money was "up front" (T. 19-21). Zona then left. He returned to the gas station approximately one hour later, at which time Gervasi suggested meeting at 3:00 P.M. in the parking lot of Ruby Red's Pizzeria, Transit Road, Williamsville, New York (T. 23). The exchange was to consist of $10,000 in counterfeit $20 Federal Reserve Notes for $1,200 in genuine currency (T. 95, 97).

Gervasi arrived there by automobile shortly after Agent Zona, who was accompanied by Catalano, and parked parallel to their automobile (T. 24). Zona asked Gervasi if he had the "stuff" and Gervasi replied, "Yes." (T. 25).

There, the counterfeit obligations (Exs. 1 and 2) were exchanged for the genuine currency (T. 26, 34-35), whereupon Gervasi said, "Good." (T. 35). Zona then said, "If everything goes well, I will give you a call at the gas station in a few days." Gervasi replied, "Fine, I'll be there." (T. 36).

On June 26, 1972, Agent Zona placed a telephone call to Don's Arco Gas Station from the Secret Service Office in New York City (T. 37-38, 51; Ex. 4). During the course of that conversation, Gervasi said he had *$60,000 at his*

fingertips [emphasis supplied] and that *he could come up with it in a day* [emphasis supplied]. Zona then told Gervasi he would be there on Wednesday[2] (Ex. 4).

At approximately 11:00 A.M. that day, Zona arrived at the gas station. He and Gervasi proceeded to the back room. There, Gervasi told him, "I haven't got $60,000 like I told you, I have only got $50,000." Gervasi then pointed to a Pizzeria down the street and told Zona to meet him there at 12:30 P.M.[3] (T. 52).

Zona arrived there first accompanied by Secret Service Agent Guy P. Caputo, whom Zona later identified as his cousin Louie from New York City (T. 54-57). Gervasi arrived shortly thereafter in a green Chevrolet. He told Zona he had the "stuff", but again suggested meeting at Ruby Red's Pizzeria because, "there is (sic) cops around here, I don't want to deal here." (T. 54).

Within fifteen minutes Zona, Caputo and Gervasi met in the parking lot of Ruby Red's Pizzeria. They went inside to discuss the situation. It was here that Agent Zona introduced Agent Caputo to Gervasi as his cousin Louie (T. 56-57). Initially, there was general discussion respecting future transactions wherein Gervasi indicated that there was more money around but that he would need, "a couple more days to get this." (T. 57). Gervasi went on to say that the counterfeit money was in a bag in his green Chevrolet which he left in the first bay or well area of his gas station. Gervasi then suggested that he would leave first and Zona and Caputo, known to him as Sam and Louie, would follow and pull their car into the second bay or well where there would be an exchange of the "bad money" for the "good" money (T. 51, 55-58, 151-152).

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[2] Wednesday being June 28, 1972.

[3] Regina's Pizzeria, Main and Tennyson Streets, Williamsville, New York.

Within minutes, the agents arrived at the gas station; Gervasi motioned them in; he pointed to a bag on the rear floor of the green Chevrolet; the agents looked in and saw what appeared to be, and what they testified to, as experts, was counterfeit currency (T. 60-62, 155-156; Ex. 3).

Zona then walked out of the gas station, opened up the trunk of his car and retrieved the genuine currency, a prearranged signal to fellow agents in the area to come in to effect arrests, including simulated arrests of Agents Zona and Caputo (T. 63, 139, 158-160, 184).

ARGUMENT

POINT I

The jury properly found the appellant guilty of Count IV of the Indictment

The appellee concedes that inducement, the first element of the bifurcated test of entrapment first set down in this Circuit in *United States v. Sherman,* 200 F.2d 880 (2nd Cir. 1952), exists. From the record, it is also abundantly clear that the overwhelming evidence of the appellant's propensity, the second element of that test, is totally uncontradicted.

The appellee emphasizes the inducement only which suggests that he is blending these two distinct elements. As this Court said in *United States v. Riley,* 363 F.2d 955 (2nd Cir. 1966) at 958:

> "The element [of inducement] goes simply to the government's initiation of the crime and not to the degree of pressure exerted. . ."

The Supreme Court has recently made this abundantly clear. *United States v. Russell,* 411 U. S. 423 (1973).

The appellee also concedes that it has the burden of proving beyond a reasonable doubt the element of propensity. It may do this by showing an existing course in criminal conduct similar to the crime for which the defendant is charged, an already formed design on the part of the accused to commit the crime for which he is charged, or a willingness to commit the crime for which he is charged as evidence by the accused's ready response to the inducement. *U. S. v. Sherman, supra; U. S. v. Weiser,* 428 F.2d 932 (2nd Cir. 1970), *cert. denied,* 402 U.S. 949; *United States v. Viviano,* 437 F.2d 295 (2nd Cir. 1971), *cert. denied,* 402 U.S. 983; *United States v. Blaver,* 450 F.2d 799 (2nd Cir. 1971), *cert. denied,* 405 U.S. 1064; *United States v. Nieves,* 451 F.2d 836 (2nd Cir. 1971). Without again reciting the facts, it is patently clear that the defendant was ready, willing and able to commit the crime at any opportunity, and there is no contrary evidence to indicate that the defendant displayed the slightest hesitancy in taking advantage of the opportunity so presented. *United States v. Henry,* 417 F.2d 267 (2nd Cir. 1969), *cert. denied,* 397 U.S. 953.

With all respect to the late Judge John O. Henderson, the appellee submits that, under these circumstances, there being no factual question for a jury to consider on the issue of Gervasi's pre-disposition to commit the crime, the Court erred in submitting the issue of entrapment to the jury. In his objection to the standard charge, the prosecuter spelled out the reason for his objection (T. 359). *United States v. Riley, supra; United States v. Bishop,* 367 F.2d 806 (2nd Cir. 1966).

As the Court said in *Bishop,* factually, almost identical to the instant case, at p. 810:

> "This Court has recently declined to follow the ruling in *Sagansky v. United States,* 358 F.2d 195 (1st Cir.

> 1966) requiring the defense of entrapment to be submitted to the jury whenever evidence of inducement is presented."

And, as this Court said in *Riley,* at p. 959:

> "Even when the inducement has been shown, submission to the jury is not required if uncontradicted proof has been established that the accused was 'ready and willing without persuasion' to have been 'awaiting any propitious opportunity to commit the offense.'"

Under these circumstances, the defendant was not entitled to the charge of entrapment in the first instance. Similarly, *United States v. Ramirez,* 482 F.2d 807 (2nd Cir. 1973). See also: *United States v. Greenberg,* 444 F.2d 369 (2nd Cir. 1971), *cert. denied,* 404 U.S. 853; *United States v. Cohen,* 431 F.2d 830 (2nd Cir. 1970).

The Court having given the charge on entrapment, the jury was certainly entitled to find beyond a reasonable doubt that the defendant-appellant had the requisite propensity, that being the issue upon which its inquiry should focus and not the issue of inducement. *Sorrells v. United States,* 287 U.S. 435 and *Sherman v. United States,* 356 U.S. 369 (1958). Thus, in *Russell, supra,* where there was sufficient evidence of the defendant's propensity, his conviction was not barred even though, on the question of inducement, the proof showed that a Government agent supplied the key ingredient for the manufacture of a controlled narcotic substance in return for a share of the finished product.

Considering, that, in the first meeting of substance between Gervasi and Agent Zona on June 19, 1972, Gervasi stated that he had recently given $40,000 in counterfeit currency to a friend who had successfully passed it in

California and instructed Zona in the art of making counterfeit currency look genuine, that, in the telephone conversation between Agent Zona and Gervasi on June 26, 1972, Gervasi said he had $60,000 in counterfeit currency at his fingertips and could come up with it in a day, and finally, that, on June 28, 1972, Gervasi suggested the meeting places and mode of transfer of the money, despite his fear that, "there is (*sic*) cops around here . . .", demonstrated that he already formed a design and willingness to commit the crime for which he was convicted. He was, in the words of the *Sherman* Court, an "unwary criminal" and not an "unwary innocent."

The Government's failure to call Donald Catalano as a witness in no way mitigated its proof that Gervasi had the readiness, willingness, ability and pre-disposition to commit the crime. While it is true that he played an "intricate" part with respect to the first two counts of the indictment, the record demonstrates that Catalano was not a witness under the Government's exclusive control (T. 276-277) and was completely out of the picture nine days before the possession count upon which the defendant-appellant was found guilty (T. 86). The appellant had an equal opportunity to call Catalano as a witness, he was known to the appellant at least since March 20, 1973, the date of the suppression hearing, and was undoubtedly known to counsel since his initial representation of the appellant. Under these circumstances, there was no error. *United States v. Greenberg,* 445 F.2d 1158 (2nd Cir. 1971); *United States v. Coke,* 339 F.2d 183 (2nd Cir. 1964); *United States v. Russ,* 362 F.2d 843 (2nd Cir. 1966), *cert. denied,* 385 U.S. 923; *United States v. DeAngelis,* ____ F.2d ____ (2nd Cir. Jan. 15, 1974), Slip Op. 1447.

POINT II

The Court did not abuse its discretion in imposing a sentence of seven years imprisonment.

Conviction under Title 18, United States Code, Section 472 provides that a defendant shall be fined not more than $5,000 or imprisonment more than fifteen years, or both. The seven year term of incarceration imposed by Judge Henderson was well within the statutory limits and it is axiomatic that Federal District Judges are given vast discretion in the imposition of sentences and that any sentence imposed within the statutory limits is generally not subject to review. *United States v. Tucker*, 92 S.Ct. 589, 30 L.Ed. 592 (1972); *Gore v. United States*, 357 U.S. 386 (1958); *United States v. Jones*, 444 F.2d 89 (2nd Cir. 1971); *Whitfield v. United States*, 376 F.2d 5, *cert. denied* 389 U.S. 883 (1967); and certainly, "not where the sentence is not so irrational as to amount to a denial of due process." *United States v. Velazquez*, 482 F.2d 139 (2nd Cir. 1973) at p. 142.

Conclusion

The judgment of conviction should, in all respects, be affirmed.

Respectfully submitted,

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County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Donald N. Gervasi
Docket No. 74-1064

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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Roger J. Grazioplene

Sworn to before me this

11 day of April, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19...